SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1159

SOUTHERN PACIFIC COMPANY, *et al., Appellants,*

v.

UNITED STATES OF AMERICA, *et al., Appellees.*

On Appeal From the United States District Court for the District of Nebraska

MOTION TO AFFIRM OF APPELLEES DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND WESTERN PACIFIC RAILROAD COMPANY

ERNEST PORTER
604 Rio Grande Building
Denver, Colorado 80217

DENNIS MCCARTHY
141 East First South
Salt Lake City, Utah 84111

Attorneys for The Denver and Rio Grande Western Railroad Company

E. L. VAN DELLEN
WALTER G. TREANOR
526 Mission Street
San Francisco, California 94105

E. BARRETT PRETTYMAN, JR.
Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

Attorneys for The Western Pacific Railroad Company

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Pursuant to Rule 16(1)(c) of the Rules of this Court, Appellees Denver and Rio Grande Western Railroad Company (DRG) and Western Pacific Railroad Company (WP) move that the final judgment of the District Court be affirmed on the ground that the decision below is manifestly correct, and the questions raised by appellants are so unsubstantial as not to require further argument.

Statement

This is a direct appeal from a judgment of a three-judge District Court[1] upholding a unanimous decision of the Interstate Commerce Commission which invalidated certain preferential solicitation and preferential routing arrangements of the Southern Pacific Company (SP) and Union Pacific Railroad Company (UP). The decision will eliminate discrimination not only against Appellees WP and DRG but also against the connections of each of these railroads,[2] and will promote increased competition among the transcontinental rail routes.

This case arose because of a decision by DRG in 1957 to request a hearing before the Commission on its contention that changed circumstances after 34 years made it necessary in the public interest to modify one of nine conditions imposed by the Commission prior to permitting SP to retain control of the Central Pacific Railway Company (CP). *Control of Central Pacific by Southern Pacific,* 76 I.C.C. 508 (1923). This one condition, condition (e), obligated SP to engage in preferential solicitation on both eastbound and westbound traffic on behalf of the CP-UP route through Ogden, Utah, and was designed to prevent SP from

[1] The decision of the three-judge court is reproduced at pages 1a to 31a of the Appendix to Appellants' Jurisdictional Statement. The Jurisdictional Statement will hereinafter be cited as "J.S." and the Appendix thereto will hereinafter be cited as "J.S. App.".

[2] WP, for example, connects with the Great Northern at Bieber, California, and with the Santa Fe at several other points in California. DRG has an even larger number of connections. The effect of Appellants' preferential solicitation and routing practices is to discriminate against these connections because freight traffic diverted from WP and DRG may also be lost to their connections.

favoring its much longer and more circuitous route through El Paso, Texas (76 I.C.C. at 520, 524). In 1923, UP was the only practical link over the central route to the Midwest, since, as the Commission subsequently found, DRG, at that time, was no more than "a minor connecting line."[3] However, condition (e) did not impose *any* obligations upon UP.[4] In the 1923 *Control* proceeding, the Commission expressly reserved, in condition (i), the power to reopen the case in order to make "such orders as the commission may deem necessary or appropriate supplementary to the present order" (76 I.C.C. at 531).

Thereafter, without Commission approval, UP and SP concluded a private arrangement—the "1924 Agreement"—which went far beyond the terms of condition (e) under the guise of "clarifying" the condition. This Agreement, for the first time, imposed obligations on UP, namely, to preferentially solicit all freight traffic and to preferentially route all unrouted traffic on behalf of SP. It also went beyond the scope of condition (e) in requiring SP to preferentially route all unrouted traffic on behalf of UP, and it enlarged, as to both UP and SP, the geographic scope of the preferential solicitation and routing arrangement.

Subsequently, in 1957, DRG petitioned to reopen the 1923 proceedings pursuant to condition (i). In this

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[3] *Control of Central Pacific by Southern Pacific*, 328 I.C.C. 345, 356 (1966).

[4] In 1923, there was "no jurisdiction * * * to enforce an order against the Union Pacific or carriers other than the Southern Pacific and Central Pacific." *Control of Central Pacific by Southern Pacific*, 317 I.C.C. 469, 472 (1962).

action, DRG did not seek to abolish condition (e) altogether. To have done so would have left SP free to divert traffic from the central route to its longer El Paso route, just as it might have done in 1923. Instead, DRG sought only to modify condition (e) so that henceforth while SP would still be required to solicit in favor of the central route, DRG would be put on an equal footing with UP on traffic moving through the Utah Gateways. In other words, SP would solicit for the central route but in favor of both UP and DRG instead of in favor of UP only.

WP, an active participant in the 1923 *Control* proceeding, also entered an appearance in the reopened *Control* case. WP has, in fact, filed a separate complaint dealing with this problem.[5] WP's interest and position in this case are the same as DRG's but for slightly different reasons. As noted, DRG is primarily interested in SP's favored treatment of UP at the Utah Gateways. That is why DRG sought modification of condition (e). WP, on the other hand, is primarily interested in UP's favored treatment of SP at the same Gateways. Therefore, WP's chief concern is with the 1924 Agreement and UP's practices pursuant to that agreement.

In its petition to reopen the proceedings, DRG, noting that it had acquiesced in condition (e) when it was imposed in 1923, alleged that competitive conditions over the intervening 34 years had drastically changed

[5] In January 1966, WP filed with the Commission a complaint against UP and SP, alleging that the 1924 Agreement and the preferential practices implemented thereunder violate Section 1 of the Sherman Act (15 U.S.C. § 1), the National Transportation Policy (49 U.S.C. (preamble to § 1)), and Sections 3(4), 5(1) and 15(1) of the Interstate Commerce Act (49 U.S.C. §§ 3(4), 5(1), 15(1)). By stipulation of the parties, a hearing on that complaint is being stayed pending the ultimate disposition of the instant case.

and that the 1923 version of condition (e) was no longer just and reasonable as required by § 5(2) of the Interstate Commerce Act (49 U.S.C. § 5(2)). By a subsequent amendment to its petition, DRG asserted the unlawfulness of the 1924 Agreement and the practices thereunder. The Hearing Examiner received voluminous evidence on the present effect of the existing version of condition (e); the present effect of the 1924 Agreement; and the present effect of the practices of Appellants pursuant to the Agreement. In 1960 the Examiner ruled in favor of DRG; held the 1924 Agreement and practices thereunder to be unlawful; ordered condition (e) modified; and wrote a twenty-page opinion analyzing and evaluating the evidence on each of the three items referred to above. In other words, the Examiner's disposition of the case was precisely in line with the Commission's ultimate disposition of the same matter.

Initially, in 1962, the full Commission, on appeal from the Examiner's ruling, held that the legality of the 1924 Agreement and the practices of Appellants pursuant thereto had to be raised in a separate complaint proceeding. Then, *expressly refusing to consider any of the evidence in the record before the Examiner on the effects of that Agreement and those practices,*[6] a bare majority of six of the eleven members of the Commission decided only that condition (e) had not been shown to be unjust or unreasonable as a matter of law.[7] On appeal by DRG, the Commission was re-

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[6] *Control of Central Pacific by Southern Pacific*, 317 I.C.C. 469, 470-471 (1962).

[7] 317 I.C.C. at 469-485. *See also* Brief of the Interstate Commerce Commission, p. 27, filed in the United States District Court for the District of Colorado on November 15, 1963 in Civ. A. No. 8046.

versed. *Denver & R.G.W. R.R.* v. *ICC*, 229 F. Supp. 249 (D. Colo. 1964). Relying on this Court's decision in *A. L. Mechling Barge Lines, Inc.* v. *United States*, 376 U.S. 375 (1964), the Colorado District Court held that the Commission had erroneously refused to consider the evidence concerning the 1924 Agreement and the practices thereunder; that "the conditions and the Agreement are in reality but two aspects of the same matter"; and that the Commission should reconsider the entire matter as "one general issue." (229 F. Supp. at 253-254).

Pursuant to the mandate of the Colorado District Court, the Commission did reconsider the matter as one general issue, and thus, *for the first time*, examined and evaluated the evidence in the record on the effect of the 1924 Agreement and the practices thereunder and the interaction between that Agreement and those practices on the one hand and condition (e) on the other. In 1966, the Commission unanimously ruled "that the present effect of the discriminatory practices against the Rio Grande in the preferential solicitation and routing of traffic results in a stifling of competition between the Union Pacific and the Rio Grande on Transcontinental traffic." *Control of Central Pacific by Southern Pacific*, 328 I.C.C. 345, 356 (1966). It ordered that condition (e) "be modified by striking therefrom the name of Union Pacific as the only connection of Southern Pacific on traffic moving via Ogden" (328 I.C.C. at 357), thereby placing DRG on an equal competitive footing with UP while still protecting the Ogden route from discrimination by SP in favor of its El Paso route. The Commission further found that the preferential routing provisions of the 1924 Agreement and UP's reciprocal consent to preferential solicitation thereunder had never been authorized by

condition (e) (*ibid.*), and that these practices "are contrary to the national transportation policy" and, in the case of preferential routing, in violation of "the plain meaning of Section 3(4)" of the Interstate Commerce Act (49 U.S.C. § 3(4)) (328 I.C.C. at 357-358).

On appeal by SP and UP, a majority[8] of the three-judge District Court concluded that there is no statutory justification "for the plaintiffs' discriminatory routing and solicitation agreement or practices, or for the retention of the original condition," and sustained the decision. (J.S. App. 31a). That three-judge court decision has now been appealed to this Court.

ARGUMENT

DRG and WP strongly support the Commission's 1966 decision and its affirmance by the court below, and move that the judgment be affirmed. A reversal of the Commission's 1966 decision would create a monopoly through the central transcontinental corridor by giving UP and SP a totally unfair competitive advantage over two smaller railroads—DRG and WP—and over their connections. A reversal would completely undermine the rationale of the Commission's decision in the *Western Pacific Control* case,[9] where the Commission explicitly rejected attempts by both SP and the Santa Fe to gain control over WP on the grounds that such control would lessen competition via the central route and Utah Gateways, and therefore would be against the

[8] As we demonstrate in argument 3, the dissenting opinion by District Judge Robinson in the court below is based solely on a manifestly erroneous construction of the obligations imposed by the Pacific Railroad Acts, 12 Stat. 489 (1862), 13 Stat. 356 (1864).

[9] *Southern Pacific—Control—Western Pacific Co.*, 327 I.C.C. 387 (1965).

public interest. In addition, a reversal would constitute an unwarranted departure from the national policy endorsed by the Commission and by this Court of permitting smaller railroads to choose between competing as separate entities or becoming part of larger systems.[10] Since, as we show below, Appellants have failed to bring forth a single issue which the District Court resolved incorrectly, this Court should affirm without further consideration.

1. The Commission Was Authorized To Modify Condition (e).

It is clear that the Commission was authorized to modify condition (e) by Section 5(9) of the Interstate Commerce Act (49 U.S.C. § 5(9)) and by the reservation of jurisdiction in condition (i) of the 1923 *Control* case.

The Commission is authorized by Section 5(9) to reopen any control proceeding to issue supplemental orders, "if the terms and conditions [originally imposed] have now become unjust and unreasonable." *New Orleans* v. *Texas & N.O. R.R.*, 195 F. 2d 882, 886 (5th Cir. 1952); *accord*: *Baltimore & O. R.R.* v. *United States*, 386 U.S. 372, 387 (1967); *New Orleans* v. *Texas & Pac. Ry.*, 195 F. 2d 887, 889 (5th Cir. 1952); *Baggett Transportation Co.* v. *United States*, 206 F. Supp. 835, 842 (N.D. Ala. 1962). Thus, even if the Commission had failed to insert *any* reservation-of-jurisdiction condition in the 1923 *Control* order, it still had the power, after appropriate notice and opportunity for hearing (which it afforded the parties here), to reopen the proceeding.

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[10] *E.g.*, *Penn-Central Merger & N. & W. Inclusion Cases*, 389 U.S. 486 (1968).

However, the Commission did insert condition (i) in the 1923 *Control* order, reserving jurisdiction to reopen the proceeding "at any time" to make "such orders as the commission may deem necessary or appropriate supplementary to the present order" (76 I.C.C. at 531). Condition (i) clearly envisioned modification of the terms and conditions of the 1923 *Control* order in the light of future changes in circumstances. To hold otherwise would "illogically bind our national transportation system to archaic philosophies beneficial only for conditions of the past, but detrimental to the public welfare today." (J.S. App. 6a). Appellants' effort to distinguish between "supplement" and "modify" and to count the number of cases in which the Commission has used one or the other of these terms strains credulity. All supplementary orders modify because after they are issued, control is exercised under different conditions than before.[11]

2. After Considering, for the First Time, the Evidence in the Record on the 1924 Agreement and the Practices Thereunder, and Evaluating the Impact of That Agreement and Those Practices on Condition (e), the Commission Properly Concluded in 1966 That Condition (e) in Its Then Existing Form Was No Longer Just and Reasonable and Ought to be Modified in the Public Interest.

Repeatedly in their Jurisdictional Statement (e.g., pp. 2, 9, 10, 17-24), Appellants assert that the Commission in 1966 was faced with "an identical record" as the Commission in 1962. The incessant repetition of

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[11] One of the definitions of "supplement" is "fill the deficiencies of". Webster's Third New International Dictionary 2297 (14th ed. 1961). Clearly, what the Commission did in 1966 in exercising its power under condition (i) was to fill the deficiencies that had developed in condition (e) in the forty-three years since the original *Control* case was decided.

this phrase is designed to prop up Appellants' argument that the Commission in 1966 should have provided an elaborate explanation of the different result it reached in its second decision. But Appellants obscure the crucial fact that in 1964 the three-judge Colorado District Court reversed the 1962 Commission decision on the ground that the Commission had unduly restricted its consideration of the controversy by refusing to consider the evidence in the record relating to the 1924 Agreement, the practices of UP and SP thereunder, and DRG's contentions that there had been violations of Section 3(4) of the Interstate Commerce Act (49 U.S.C. § 3(4)). *Denver & R.G.W. R.R.* v. *I.C.C.*, 229 F. Supp. 249, 254 (D. Colo. 1964). Thus, although the record may have been physically identical in 1962 and 1966, the record actually considered in 1966 was the full record, while that considered in 1962 was only a partial record.

It is thus clear that the Commission's reasons and the basis for its decision in 1966 were entirely adequate.[12] The Commission in 1966, in fact, was simply supporting the thorough and painstaking initial decision of the Hearing Examiner in 1960. Even though it had these findings to rely upon, the Commission in 1966 went further, re-examined the entire matter anew, and spelled out the reasons for its conclusions in a

[12] In its 1966 report the Commission stated: "As we now see the case, the 1924 agreement and the actions of the parties thereunder cannot be considered in proper perspective without considering condition (e) because of the district court's determination that there is, in effect, but one general issue before the Commission. * * * Thus all evidence and issues are here considered * * *". (328 I.C.C. at 346-347). Again, in its conclusions, the Commission stated: "After consideration of the full record, without the procedural limitations before imposed, we now find * * *". (328 I.C.C. at 356).

twenty-page opinion. Thus, the Commission more than fulfilled its responsibility. *Curtis, Inc.* v. *United States,* 225 F. Supp. 894, 901-902 (D. Colo. 1964).

3. The Pacific Railroad Acts Do Not Require CP and UP to Solicit and Route Preferentially Each Other's Lines.

Appellants' contention that the Pacific Railroad Acts, 12 Stat. 489 (1862), 13 Stat. 356 (1864), require CP (and therefore SP) and UP to solicit and route preferentially each other's lines needs little comment. These Acts authorized the construction of UP westward from the Missouri River and of CP eastward to their physical junction near Ogden, Utah, and further provided for the two roads to be operated as far as the public and government were concerned "as one connected, continuous line". Appellants profess to see in the last-quoted phrase a Congressional intent to require preferential solicitation and routing of all freight traffic, to the prejudice of other connecting lines. But as pointed out by the court below, the Acts themselves specifically prohibit just such preferences and discriminations (J.S. App. 16a-17a).

The obligations imposed by the Acts are expressed in quite general terms. Since this is so, and since the Commission is charged with protecting the public interest in the light of changed circumstances, there is a presumption that the Commission's construction of the Acts is correct unless Appellants can demonstrate a clear conflict between the proposed modification of condition (e) and the terms of the Acts. Neither Appellants nor District Judge Robinson in his dissent (J.S. App. 34a-40a) have been able to demonstrate such a conflict. The underlying rationale of Appellants' argument on this issue and of Judge Robinson's entire dissent is that the Pacific

Railroad Acts compel the retention of condition (e) in the form promulgated in 1923, and therefore only Congress can change this requirement. But neither Appellants nor Judge Robinson can point to any language in the Acts which requires such a construction. To the contrary, Section 15 of the Act of 1864 demonstrates conclusively on its face that the Acts require non-discrimination. As the court below recognized, Appellants' suggested construction "contradicts not only the spirit of the acts, but the plain language as well" (J.S. App. 12a).

4. The 1924 Agreement Was Properly Cancelled by the Commission and the Preferential Practices Pursuant Thereto Were Properly Condemned.

The preferential relationship between UP and SP, elaborately woven into the terms of the 1924 Agreement, was never submitted to or authorized by the Commission and is clearly unlawful. Appellants' preferential routing agreement is obviously violative of the prohibition in Section 3(4) of the Interstate Commerce Act (49 U.S.C. § 3(4)) against prejudice to a connecting line in the distribution of unrouted traffic, and is contrary to Section 3(4)'s "manifest purpose to deprive railroads of discretion to apportion economic advantage among competitors at a common interchange." *Western Pacific R.R.* v. *United States*, 382 U.S. 237, 244 (1965). Both the preferential routing agreement and UP's preferential solicitation are

clearly "contrary to the public interest and the national transportation policy"[13] (328 I.C.C. at 356).

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

ERNEST PORTER
604 Rio Grande Building
Denver, Colorado 80217

DENNIS MCCARTHY
141 East First South
Salt Lake City, Utah 84111

Attorneys for The Denver and Rio Grande Western Railroad Company

E. L. VAN DELLEN
WALTER G. TREANOR
526 Mission Street
San Francisco,
California 94105

E. BARRETT PRETTYMAN, JR.
Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

Attorneys for The Western Pacific Railroad Company

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[13] The correctness of this finding seems too apparent for argument. The Policy places upon the Commission the duty to provide for "fair and impartial regulation" of transportation, to "foster sound economic conditions in transportation and among the several carriers," to avoid "undue preferences or advantages, or unfair or destructive competitive practices", and to preserve a national transportation system "adequate to meet the needs . . . of the national defense." 49 U.S.C. (preamble to § 1). Moreover, in determining what are "unfair competitive practices" under the Policy, the Commission has been commended to the antitrust laws." *New York Central R.R.* v. *United States*, 194 F. Supp. 947 (S.D.N.Y. 1961), *aff'd per curiam*, 368 U.S. 349 (1962). This Court also has said that the Commission should give deference to the antitrust laws (*McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944)), and has noted the relevance of the antitrust laws in determining whether an agreement is "contrary to the public interest." *FMC* v. *Svenska Amerika Linien*, — U.S. —, 36 U.S.L.W. 4213, 4215 (1968).